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FILED
NOV 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

44pg No. 06-11612

In the Supreme Court of the United States

HOMERO GONZALEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD") as *amici curiae* in support of Petitioner, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in safeguarding the procedural and substantive rights of criminal defendants.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership

includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

Amici Curiae file this brief because of their concern about the erosion of federal criminal defendants' constitutional right to the presence at felony trials of independent, Article III district judges, which we believe an affirmance in this case would encourage. Magistrate judges must not be permitted to pressure lawyers to surrender their clients' fundamental Article III right, as occurred in this case. We review the legislative history of the Federal Magistrates Act ("FMA") in considerable detail below because it shows that Congress unquestionably shared this view, and intended, as an essential predicate for a magistrate judge to exercise trial jurisdiction, that the defendant's explicit, voluntary, knowing, and personal waiver be obtained.

SUMMARY OF ARGUMENT

In *Gomez v. United States*, 490 U.S. 858 (1989), this Court held that the FMA does not authorize a magistrate to conduct *voir dire* in a felony trial over the defendant's objection. It reached this conclusion by applying the "settled policy" that a statute should be construed, if possible, to avoid a constitutional issue, and by analyzing Congressional intent in light of the overall statutory scheme. Congress, the Court held, carefully limited the trial jurisdiction of magistrates in criminal cases to petty offenses and misdemeanors, and then only where the defendant explicitly and voluntarily consented in writing.

In *Peretz v. United States*, 501 U.S. 923 (1991), a closely divided Court held there was no constitutional issue when a magistrate conducts *voir dire* with the defendant's consent, and that such a procedure was authorized by the Act's "additional duties" clause. The Court did not decide the issue, raised here, of whether "consent" must be communicated personally by the defendant and be knowing and voluntary.

We agree with Petitioner that his claim raises a substantial constitutional question. As in *Gomez*, a construction of the statute that avoids that constitutional question also happens to be consistent with the legislative history. Congress did not intend such a significant constitutional function to be

delegated absent the defendant's personal, knowing, voluntary consent.

It seems beyond serious doubt that, under Article III, a felony defendant, at all critical stages of his trial, is entitled to the presence of a district court judge, appointed by the President and confirmed by the Senate, who is immune from outside pressure by virtue of his life-time tenure and irreducible salary. Jury selection, as the *Gomez* Court recognized, is such a critical stage of trial. It is in many instances the most important part of the trial, as the composition of the jury may very well determine the trial's outcome. It is also a process that is relatively immune from effective review by a higher tribunal. Thus, a felony defendant has a fundamental right to the personal presence of an Article III judge at *voir dire*.

Although due process does not require the waiver of all of a defendant's procedural trial rights to be effected personally, as opposed to by the actions or inactions of the defendant's attorney, the right at issue here is much closer in nature to those rights that must be waived personally by the defendant than to those rights that need not be. Article III rights, as this Court recognized in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986), involve the trial's basic structure or mode of procedure, and are easily susceptible to formal waiver by the defendant at a particular time prior to

trial, as opposed to the kinds of evidentiary and strategic issues that may arise suddenly at trial and force counsel to make on-the-spot choices. At the very least, the question of whether a defendant's waiver of his right to an Article III judge at *voir dire* must be made by the defendant personally raises a significant constitutional issue that the statute should be construed to avoid.

The FMA's history makes clear that, regardless of how the Court at present would construe constitutional requirements, *Congress* believed that the delegation of trial functions to magistrates posed substantial Article III and due process issues that *Congress* intended to avoid by requiring explicit constitutional warnings and, at least in criminal cases, the defendant's personal, voluntary consent.

This Congressional intent is clear, as we show below, in the legislative history of the 1968 act, which established the position of magistrate and authorized magistrates, with explicit consent, to conduct petty offense and certain misdemeanor trials. Congressional intent is also clear in the history of the 1976 amendments intended to clarify magistrates' additional duties, and of the 1979 amendments slightly expanding magistrates' misdemeanor trial jurisdiction, and creating civil trial jurisdiction. The legislative history demonstrates that Congress understood that the waiver of fundamental,

structural, Article III trial rights could only be accomplished where the defendant had been informed of his right to insist on the presence of an Article III judge, and had himself voluntarily chosen to waive that right.

Contrary to Congressional intent, the manner in which the magistrate judge obtained "consent" in this case was inherently coercive of the attorney, and made it virtually certain that Petitioner himself neither understood his rights nor realized that his attorney was waiving them for him. The Court can easily avoid such ambiguous "waivers" in the future by requiring, consistent with Congressional intent, that the defendant personally waive his right to an Article III judge at *voir dire*, on the record, after being informed of his right to refuse consent, and by requiring that such refusal would not be held against the defendant.

Finally, the plain error rule does not apply. Petitioner did not "forfeit" his fundamental right to the presence at his felony trial of a judicial officer authorized to preside by failing to assert such right, where his claim is that this right is of such a fundamental nature that it may not be lost absent the defendant's own personal, knowing and voluntary waiver.

ARGUMENT

THE FEDERAL MAGISTRATES ACT REQUIRES THAT A CRIMINAL DEFENDANT PERSONALLY GIVE KNOWING, VOLUNTARY CONSENT TO THE DELEGATION OF FELONY TRIAL *VOIR DIRE* TO A MAGISTRATE JUDGE

A. A Construction of the Federal Magistrates Act That Permitted a Defendant's Fundamental, Personal Right to the Presence Of an Article III District Judge to Be Waived By the Defendant's Counsel Would Raise a Significant Constitutional Issue of the Type That It Is This Court's 'Settled Policy' to Avoid

In *Gomez v. United States*, 490 U.S. 858 (1989), a unanimous Court, invoking its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," *id.* at 364 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986)), held that the "additional duties" clause of the Federal Magistrates Act, 28 U.S.C. § 636(b)(3),[2] does not

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[2] The clause presently reads as follows: "A magistrate judge may be assigned such additional duties as are not

authorize a federal magistrate to conduct felony *voir dire* over a defendant's objection. The Court based this conclusion on "the context of the overall statutory scheme," *id.*, including Congress's omission of felony jury selection from the sections of the Act enumerating the pretrial and trial duties that magistrates may perform. It reasoned that "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." *Id.* at 872.

Two years later, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court, by a bare 5-4 majority, clarified *Gomez*, holding that magistrate-conducted *voir dire* was consistent with the "additional duties" clause so long as the "defendant" consented. Reasoning that there was no Article III issue in such an instance, it did not apply the constitutional avoidance doctrine. Peretz's attorney had twice "consented" to magistrate-conducted *voir dire* on his client's behalf, and in his client's presence, once before the district judge well before trial, and later before the magistrate herself. In the second instance, the attorney assured the magistrate that his client had personally consented. *Id.* at 925. There was nothing in the record to suggest that Peretz himself was unaware of his attorney's conduct

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inconsistent with the Constitution and laws of the United States."

or of his right to insist upon the presence of an Article III judge. Thus, the Court did not include in its certified questions the issue of whether an attorney's *vicarious* "consent" on behalf of his client would suffice to remove any constitutional issue. Justice Marshall, joined in dissent by Justices White and Blackmun, would have reached this issue and held, as a matter of statutory construction, that the defendant's personal, knowing, and voluntary consent was required. *Id.* at 947 n.6.[3]

This case squarely presents the issue that the *Peretz* majority did not answer. Is there a constitutional issue present where a federal magistrate proceeds to conduct felony *voir dire*

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[3] Justice Marshall's dissent also argued that *Gomez* required a holding that delegation of felony *voir dire* to a magistrate was not authorized by the Magistrates Act even with consent. Justice Scalia's separate dissent was in "general agreement . . . [that] *Gomez* was driven not primarily by the constitutional problems associated with forcing a litigant to adjudicate his federal claim before a magistrate, but by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the 'additional duties' clause from swallowing up the rest of the statute." *Peretz v. United States*, 501 U.S. 923, 955 (1991) (Scalia, J., dissenting) (citing *Gomez v. United States*, 490 U.S. 858, 872 (1989)).

without obtaining the defendant's personal, knowing, voluntary consent? If so, then this Court, pursuant to its "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues," should construe the statute, as it did in *Gomez*, to preclude such a delegation of Article III authority.

As a threshold matter, amici agree with Petitioner that a federal felony defendant has a personal right to have an Article III judge preside at his trial. In *Schor*, the Court recognized that Article III confers upon a litigant a "personal right" to "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States." 478 U.S. at 848. The Framers believed that life-time tenure and an irreducible salary were essential to guarantee judicial independence, especially in criminal cases. *See United States v. Hatter*, 532 U.S. 557, 568-69 (2001). Criminal trials are at the "protected core" of Article III's guarantee of independent adjudication by life-tenured judges. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.25 (1982) (plurality opinion).

If a federal felony defendant has a constitutional right to have an Article III judge preside at his criminal trial, then he has a strong constitutional claim to have such a judicial officer conduct the jury selection part of such a trial. *Gomez* recognized that *voir dire* is a "critical stage" of

a criminal trial. 490 U.S. at 873 (citing *United States v. Powell*, 469 U.S. 57, 66 (1984) ("trials generally begin with *voir dire*"); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (*voir dire* "a necessary part of trial by jury"); *Lewis v. United States*, 146 U.S. 370, 374 (1892) (trial commences at least from the time jury selection begins). *See also Powers v. Ohio*, 499 U.S. 400, 412 (1991) (*voir dire* is a "phase of the trial . . . . The influence of the *voir dire* process may persist through the whole course of the trial proceedings.") (citing *Gomez*, 490 U.S. at 874). The *Gomez* Court rejected application of the harmless error doctrine because it concluded that a defendant's right to have all such "critical stages of a criminal *trial* conducted by a person with jurisdiction to preside" was so "basic." *Gomez*, 490 U.S. at 876 (emphasis added).

A defendant's interest in having an Article III judge preside at *voir dire* is further demonstrated by the Court's "serious doubts that a district judge could review [*voir dire*] meaningfully" if it was conducted in the first instance by a magistrate. *Gomez*, 490 U.S. at 874. The judge presiding at *voir dire* "must rely largely on his immediate perceptions," *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981); the juror's "manner . . . is oftentimes more indicative of the real character of his opinion than his words," *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984). *Gomez* thus reasoned:

> Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner – often, in the federal system, the court – must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial.

490 U.S. at 874-75 (internal citations omitted).[4]

While *Peretz* establishes that a defendant may forego his or her constitutional interest in the presence of an Article III judge at *voir dire*, the decision is consistent with this Court's case law, as well as the text of Article III, under which a

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[4] The lower courts have recognized that it is virtually impossible for any reviewing court to second guess the judgments of the presiding judicial officer at *voir dire*. *See, e.g.*, *United States v. Perez*, 387 F.3d 201, 205 (2d Cir. 2004) ("The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion.").

defendant has a fundamental right to the presence of such an officer at all critical stages of the trial. The question then becomes, in light of *Peretz*'s clarification: how may that right be waived? For a defendant to waive such a significant constitutional right, amici agree with Petitioner that he must do so personally, voluntarily, and with knowledge of the right he is waiving.

As Justice Scalia has explained: "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

"For certain fundamental rights, the defendant must personally make an informed waiver." *Hill*, 528 U.S. at 115. These include the right to counsel, *see Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), the right to trial, *see Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969), the right to trial by jury, *see Duncan v. Louisiana*, 391 U.S. 145, 158 (1968), and the right to plead not guilty, *see Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

The Court has termed such rights those that "dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49.

They generally are rights "which must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker v. Wingo*, 407 U.S. 514, 529 (1972). "[C]ourts indulge every reasonable presumption against waiver" of such rights. *Roell v. Withrow*, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

On the other hand, the rights that *counsel* may waive in his discretion or on his client's behalf include rights that generally arise during the course of the trial, such as the rights to object to the admission of evidence, to proffer evidence, or to raise issues related to the manner in which the prosecutor or the court is conducting the trial. *See Hill*, 528 U.S. at 115.

The defendant's personal right to a life-tenured, independent Article III judge presiding at the "critical" *voir dire* stage of trial is one of those basic structural rights that may be validly surrendered only through the defendant's own "informed waiver." This necessarily follows from the fundamental nature of the right under Article III. It is a right that "dictate[s] the procedure[] by which [a] . . . criminal matter[] must be tried." *Schor*, 478 U.S. at 848-49. It is the type of right that "must be exercised or waived at a specific time or under clearly identifiable circumstances." *Barker*, 407 U.S. at 529. It is not the type of right that arises suddenly at trial

and requires an instantaneous professional judgment.

Indeed, under a traditional cost-benefit due process analysis, there is every reason to require a personal, on-the-record waiver to ensure it is knowing and voluntary, and virtually no reason not to, since the cost in judicial or governmental resources would be nil. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 Pa. L. Rev. 473, 514 (1978) ("diminution in protection" against an "uninformed or unintentional relinquishment of a protected right" may be justified only when a formal waiver procedure is "infeasible, or involves substantial costs to the functioning of the legal system").

Therefore, this Court, as in *Gomez*, should adopt a readily available alternative construction of the FMA that presents no constitutional issue, and hold that the personal, knowing, voluntary consent of the defendant is required.

B. Congress Believed That Article III Required A Criminal Defendant's Personal Consent, Given Knowingly and Voluntarily, Before Critical Criminal Trial Functions Could Be Lawfully Delegated to a Magistrate

Regardless of whether the *Constitution*, as now construed by the Court, requires that a defendant

personally, knowingly, and voluntarily waive his Article III rights before a magistrate judge may validly preside at a critical stage of a felony trial such as *voir dire*, *Congress* certainly believed there had to be such a requirement when it enacted the relevant provisions of the FMA. Indeed, Congress "circumscribed" magistrates' authority, not only due to its understanding of "constitutional constraints," but also "in the interests of policy." *Gomez*, 490 U.S. at 872. Having withheld from magistrate judges the authority to preside at any critical stage of a felony trial, and having empowered such lesser officers to preside at misdemeanor or petty offense trials only with the criminal defendant's personal, explicit, knowing and voluntary consent, Congress could not possibly have intended magistrates, as an "additional duty" under 28 U.S.C. § 636(b)(3), to preside at felony *voir dire* without, at the very least, obtaining a similar quality of personal consent from the defendant.

1. The Congress That Enacted the Original Magistrates Act in 1968 Believed That a Criminal Defendant Had a Constitutional Right to the Presence of an Article III Officer at Trial and That Waiver of This Right Had to Be Explicit, Personal, Non-Coerced, and With Knowledge of the Right Being Waived

As Justice Stevens' opinion in *Gomez* recounts, when Congress enacted the FMA in 1968, it limited magistrates' trial power to bench trials of minor criminal offenses in which "the defendant, *in writing, specifically waived* his or her rights to trial before a judge and perhaps by a jury." 490 U.S. at 866 (citing 82 Stat. 1116, 18 U.S.C. § 3401(b) (1964 ed., Supp. IV) (emphasis added)). Congress enacted this provision after extensive debate about and legal analysis of the Article III and due process interests at stake. It viewed the defendant's explicit, voluntary consent to magistrates' exercise of criminal trial jurisdiction as essential to the Act's constitutionality.

During the extensive hearings that preceded the FMA's enactment, Assistant Attorney General Vinson testified that "only article III judges may be empowered to conduct trials of Federal criminal offenses, including minor offenses," and that this was a matter of "subject-matter jurisdiction" that a defendant "cannot waive." H.R. Rep. No. 90-1629

(1968), 1968 U.S. Code Cong. & Admin. News 4252, 4264. These objections caused the House Subcommittee on Improvements in Judicial Machinery to commission an influential staff legal memorandum which convinced the Senate and House Judiciary Committees that "it is constitutionally permissible to entrust the trial of minor offenses to U.S. magistrates *under the conditions set forth in S. 945*." *Id.* (emphasis added). One such condition was "the defendant's election to be tried before a magistrate rather than a judge of the U.S. district court." *Id.*

The legislation's principal Senate sponsor, Senator Joseph Tydings, reiterated in testimony before a subcommittee of the House Judiciary Committee that the Justice Department's concern about the legislation's constitutionality had been met by inclusion of a provision for "knowledgeable waiver by the accused of his right to jury trial before the district court. The magistrate is required by the terms of the act to give the defendant a careful explanation of the right to elect trial in the district court, and of his possible right to demand jury trial in that court [depending upon the seriousness of the offense]." *Federal Magistrates Act: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong. 72-73 (1968). Senator Tydings noted that, in view of the strict written waiver provisions that had been included in the Act, the

Justice Department was reevaluating its position. *Id.*

During the lengthy floor debate, Representative Cahill vigorously opposed as unconstitutional the creation of the post of "assistant judge" appointed by the district court as opposed to the President and lacking the independence afforded by life tenure and an irreducible salary. 114 Cong. Rec. 27338 (1968). He questioned the fairness of requiring a defendant to *request* "what is a constitutional right to be tried by an article III judge." *Id.* A legislative sponsor, Representative Poff, countered that various "safeguards" had been built into magistrates' exercise of trial jurisdiction, including limiting such jurisdiction to select "minor offenses," and requiring a rigorous consent procedure:

> The magistrate will be required to give every defendant brought before him a careful explanation of his right to elect trial before a judge of the district court . . . . S. 945 specifically forbids the magistrate to proceed to trial unless the defendant, having heard the magistrate's explanation, executes a written election to be tried before the magistrate and a written waiver of whatever jury trial rights he has.

Id. at 27341.

Representative Poff reasoned that the due process clause permitted a defendant to waive his right to trial before an Article III judge and compared this right to "analogous rights guaranteed by the Constitution, such as the right to trial by jury, the right to grand jury indictment, and the right to a speedy trial." *Id.* at 27342. Of course, these are fundamental rights that this Court's decisional law had recognized were personal to the defendant and had to be waived personally. *See* pp. 14-16, *supra*.

Representative Poff continued: "The intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case – all show a statutory intent to preserve trial before the district judge as the principal – rather than an elective or alternative – mode of proceeding in minor offense cases." *Id.* at 27342, *quoted in Gomez*, 490 U.S. at 872 n.24.

2. **In Amending the Act in 1976 to Clarify Magistrates' 'Additional Duties,' Congress Did Not Relax the Stringent, Written Consent Requirement for Magistrates to Exercise Criminal Trial Jurisdiction**

In 1976, Congress amended the FMA to "clarify and further define the additional duties which may be assigned to a United States

Magistrate." *Gomez*, 490 U.S. at 867 (quoting H.R. Rep. No. 94-1609, at 2 (1976), 1976 U.S. Code Cong. & Admin. News. 6162). The amended act provided more detail about the pre-trial, post-trial, and administrative functions magistrates could perform, and also retained the residual "additional duties" clause, § 636(b)(3), but did not alter or expand the statute's explicit, written consent provisions for the trial of minor criminal matters. *See generally Gomez*, 490 U.S. at 868-69 & nn. 14-16. Nor did the amended statute enlarge the range of alleged criminal violations that magistrates would have jurisdiction to try.

The legislative history makes clear that Congress's principal purpose continued to be to encourage district courts to use magistrates to resolve, or to assist the district court in resolving, less substantial matters so that district judges would be free to concentrate on their core Article III function of trying cases. *See Gomez*, 490 U.S. at 869-70, 872.

3. In Expanding Magistrates' Criminal And Civil Trial Jurisdiction in 1979, Congress Reiterated Its Requirement That Consent Be Personal, Knowing, And Truly Voluntary

In 1979, Congress enlarged magistrates' criminal trial jurisdiction, but made clear that it continued to view the criminal trial as the Article III function to which the strictest waiver rules must

apply. While it provided for expanded misdemeanor trial jurisdiction, including over jury trials, and for magistrates to try civil cases, it continued the statute's explicit, written, personal consent requirement for criminal trials only. It made clear as well that a criminal defendant may not be required to assert his right to an Article III judge at trial or lose it; a knowing, intelligent, voluntary waiver, made personally by the defendant, remained necessary.

In construing the 1979 amendments, this Court noted that, for both civil and criminal trials, "[a] critical limitation on [magistrates'] expanded jurisdiction is consent." *Gomez*, 490 U.S. at 870. In civil matters, "[a]s amended in 1979, the Act states that 'neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.'" *Id.* (quoting 93 Stat. 643, 28 U.S.C. § 636(c)(2)). However, in criminal matters, the Court noted, "the magistrate's criminal trial jurisdiction depends on the defendant's specific, *written* consent." *Id.* at 871 (emphasis added).

Significantly, Congress used waiver rules not only to distinguish between civil and criminal litigants' rights to the presence of an Article III judge, but also to differentiate the respective interests of a criminal defendant and the Government. As the Court has noted, under the 1979 amendments, if the Government wishes to assert its

Article III interest in *voir dire* by the district judge, it must affirmatively petition the court to grant its request. However, a defendant may stand on his or her Article III rights: a magistrate lacks "criminal trial *jurisdiction*" over misdemeanors absent the "defendant's written consent." *Gomez*, 490 U.S. at 871 (citing 18 U.S.C. § 3401(b)) (emphasis added).

The 1979 legislative history makes clear that, to the extent Congress intended to empower magistrates to preside at a criminal trial at all, it intended to require that the exercise of such authority be preceded by a strict Article III waiver made personally by the defendant. The House Judiciary Committee equated the waiver of the right to trial before a district judge to waiver of other fundamental, structural rights that "the accused may consent to waive . . . as long as the answer is willingly and knowingly made." H.R. Rep. No. 96-287, at 8 n.20 (1979). Invoking the constitutional waiver standard set forth in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the House Report stated: "[W]aiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived." *Id.* at 18.

The Senate Report reasoned that the elimination of a written waiver requirement for petty offenses would be constitutional, but nevertheless retained it, as a matter of policy, because of the need

for "further empirical evidence of how the magistrates system works." S. Rep. No. 96-74, at 6 (1979), 1979 U.S. Code Cong. & Admin News 1469, 1474. Meanwhile, the report emphasized that for *misdemeanors*, "[i]t is expected that this waiver should be considered a critical stage requiring the opportunity to consult counsel, as should the decision to proceed before a magistrate in more serious petty offense cases where there is a significant possibility of punishment by imprisonment." *Id.* at 7, 1475. Reiterating Congress's intent that consent to trial before magistrates in all cases be genuinely voluntary, the report continued: "The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrate." *Id.* at 13, 1481.

C. Having Limited Magistrates' Criminal Trial Jurisdiction to Misdemeanors, and Insisted That Such Jurisdiction Be Exercised Only When the Defendant Gives Personal, Knowing, Voluntary Consent, Congress Could Not Possibly Have Intended District Courts, Pursuant to the 'Additional Duties' Clause, To 'Experiment' With Delegating *Voir Dire* in *Felony* Trials Without Obtaining Comparable Consent

In *Gomez*, the legislative history of the FMA, together with its overall structure, convinced this

Court that Congress had made "an implicit withholding of the authority to preside at a felony trial," a point it noted the government had conceded. *Gomez*, 490 U.S. at 872 & n.22. The Court observed that, whenever Congress did intend to create criminal trial jurisdiction for magistrates, it applied a strict constitutional waiver standard. Having so carefully linked magistrates' trial jurisdiction to the obtaining of a criminal defendant's explicit, personal consent, Congress could not have intended "constructive experiments" under the general "additional duties" clause, *see Peretz*, 501 U.S. 932-33, to include delegation to magistrate judges of felony *voir dire*, a critical stage of trial,[5] without equivalent procedural safeguards.

As demonstrated above, both the Congress that enacted the original "additional duties" clause in

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[5] The Court in *Gomez* believed that Congress must have understood that *voir dire* was part of the trial. Besides citing its own decisions, beginning with *Hopt v. Utah*, 110 U.S. 574, 578 (1884), holding that jury selection is part of trial, *see Gomez*, 490 U.S. at 873, the Court pointed out that Congress had deemed *voir dire* to be part of trial for speedy trial purposes when it passed the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982 ed. and Supp. V), in 1975, just one year before it amended the "additional duties" clause of the Magistrates Act; had placed rules pertaining to criminal petit juries in the "Trial" section of the Federal Rules of Criminal Procedure; and, in Rule 43(a), had included in the notion of "trial" the "impaneling of the jury." *Gomez*, 490 U.S. at 873 & n.26.

1968 and the Congress that amended it in 1976 believed that a criminal defendant has a fundamental constitutional right to a trial before a fully independent district judge (or at least a strong claim to such a right), and that a defendant may forego this right only after a formal, knowing, voluntary, personal waiver. These Congresses evidently believed that the *Government* could be required to assert its Article III right or lose it, but that the *defendant* could stand on his right and retain it unless and until he explicitly and personally waived it. In retaining this differentiation in the 1979 legislation, Congress continued to require written consent in *criminal* matters, even as it adopted a less formal consent requirement for magistrates to exercise *civil* trial jurisdiction.[6]

Significantly, the "consent" process followed in Petitioner's felony trial below would not suffice under the waiver standard for *civil* trials required by

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[6] In 1996, Congress amended 18 U.S.C. § 3401(b) to permit a criminal defendant's explicit consent to be made orally, on the record, as opposed to in writing, and to permit the district court to explain to the parties in civil cases that they may, but need not, consent to trial by magistrate judge. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 202, 110 Stat. 3847, 3849 (1996) (amending § 3401(b)). Congress continued the requirement in misdemeanor cases that the magistrate judge carefully explain to the defendant his right to trial before the district judge and his right to withhold his consent.

Justice Souter's majority opinion in *Roell v. Withrow*, 538 U.S. 580 (2003). In *Roell*, the Court held that a *civil* litigant's consent could be inferred based upon the district court's repeated warnings, beginning well before trial, that any litigant who did not consent would have a right to trial before the district judge and would not be penalized for exercising such right, and the parties' course of conduct in appearing for trial and not taking issue with the magistrate judge's observation that she had the parties' consent. Justice Souter's opinion agreed with Justice Thomas's dissent (joined by Justices Stevens, Scalia and Kennedy) that, even in a civil case, "notification of the right to refuse [the request of] the magistrate judge is a prerequisite to any inference of consent." *Id.* at 587 n.5. The Court acknowledged Congress's concern that litigants not be subjected to "pressure, tacit or expressed, . . . to induce them to consent to trial before the magistrates." *Id.* at 589 (quoting S. Rep. No. 96-74, at 5 (1979), 1979 U.S. Code Cong. & Admin. News 1469, 1473).[7]

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[7] The dissenters would have further required express consent, reasoning as follows:

> Reading § 636(c)(1) to require express consent not only is more consistent with the text of the statute, but also ensures that the parties knowingly and voluntarily waive their right to an Article III judge. A party's express consent is a clear and unambiguous indication that the party had sufficient notice it was freely waiving

In Petitioner's case, the district judge failed to provide the parties prior warning that he intended to delegate jury selection, let alone inform Petitioner of his right to withhold consent. On the afternoon of trial, the magistrate judge appeared, called counsel to the bench, obtained their "consent" even before providing an interpreter for the non-English-speaking defendant, and then began *voir dire*, without ensuring in any manner that Petitioner understood that "waiver" of his constitutional rights was occurring.

If *civil* litigants may not validly waive their Article III rights unless they have been notified of their right to trial before a district judge and their right to refuse consent, and have made clear by their conduct that they in fact do consent, then surely at least as much procedural protection is required under the FMA for a felony defendant to waive his Article III rights during such a critical stage of his trial as *voir dire*. Significantly, Justice Souter, in upholding the implicit consent in *Roell*, contrasted the civil trial provision of the FMA with 18 U.S.C. § 3401(b), under which magistrate judges may preside at *misdemeanor* trials "only if the defendant 'expressly

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its right.

Roell v. Withrow, 538 U.S. 580, 595 (2003) (Thomas, J., dissenting).

consents . . . in writing or orally on the record.'" *Id.* at 587.

Similarly, if a misdemeanor defendant must consent explicitly, on the record or in writing, after the court has explained to him his Article III rights and his right to refuse to consent, then surely a felony defendant is entitled to at least that much due process before being denied his Article III rights during *voir dire*. "[M]agistrate supervision of entire civil and misdemeanor trials . . . [is] comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Peretz*, 501 U.S. at 933. The procedural protections that Congress intended to protect the Article III rights of civil litigants and criminal defendants charged with petty offenses or misdemeanors must be at least as rigorous where the trial rights of *felony* defendants, some of whom face the prospect of life imprisonment or imposition of the death penalty, are at stake.

D. A Formal Consent Procedure During Which a Criminal Defendant Is Informed of His Right To an Article III Judge, That He May Refuse To Consent to the Delegation of the *Voir Dire* Process to a Magistrate Judge, and That Such Failure to Consent Will Not Be Held Against Him, Is Essential to Effectuate Congressional Intent and to Avoid the Inherent Coercion That Occurred in This Case

The "consent" procedure the district court employed in this case was plainly insufficient under Article III, and demonstrates the need for a bright-line rule requiring the criminal defendant's personal, explicit, truly voluntary waiver of his right to the presence of a district judge at felony *voir dire*, after his receipt of the court's clear statement that he will not be penalized for refusing such consent. Otherwise, as this case illustrates, a waiver process will be inherently coercive, contrary to Congressional intent as well as the Due Process Clause.

In this case, the district court made unmistakably clear its *preference* that the parties "consent" to *voir dire* by the magistrate: on the morning *voir dire* was to begin, the judge did not even show up, but arranged for a magistrate judge to appear in his place. Even before determining whether the defendant spoke English or had the services of an interpreter, the magistrate judge summoned the attorneys to the bench, asked for and

received their "consent," and then immediately commenced *voir dire*. Evidently the jury *venire* was already waiting for the proceedings to begin when the magistrate judge solicited the attorneys' "consent."

This process was coercive. The district court and the magistrate judge apparently assumed that counsel's consent was a foregone conclusion. A refusal to consent would have significantly delayed the proceedings and inconvenienced the district judge, the magistrate judge, and the prospective jurors.

Under such circumstances, a defendant facing a severe sentence for marijuana smuggling (190 months, as it turned out), if not informed of his right to withhold consent, would be hard-pressed to assert his rights and defy the evident wishes of the district and magistrate judges, assuming the Petitioner even knew what was occurring. Here, the evidence suggests the Petitioner had no idea – the "consent" process occurred at the bench, before he had the services of a court-appointed, Spanish interpreter, and the *voir dire* process began immediately thereafter.

Whenever a district or magistrate judge requests a criminal defendant's "consent" to waive his Article III rights at felony *voir dire*, it is implicit that the court prefers this process – otherwise such consent would not be solicited. The pressure will be particularly great on a lawyer who regularly

practices before such court to acquiesce so as not to incur the ill-will of the court which may compromise his effectiveness in this or future cases. "[T]he pressure that an attorney might feel to accommodate the judge's schedule cuts against eliminating a defendant's right to personally consent to or refuse a magistrate judge's jurisdiction over a critical stage of his trial." *United States v. Gamba*, 483 F.3d 942, 954 (9th Cir. 2007) (Fisher, J., dissenting).[8]

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[8] Such pressures are regularly felt by lawyers who repeatedly appear before the same district court. A Criminal Justice Act panel attorney, Assistant Federal Defender, or private attorney who appears regularly before the same court must struggle against "a strong interest in having judges . . . think well of him" that his client may not share. *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting). *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2480 (2004) (noting the pressure on public defenders and "[r]epeat defense counsel" to "choose their battles wisely"); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73, 85 & n.32 (1993) (noting pressure on public defenders to "accommodat[e] . . . the case management and budgetary priorities of the court"); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179, 1238-40 (1975) (noting the effect on some public defenders of "judicial pressures and suggestions" and fear of "reprisals [in] future cases"). In typical situations where this pressure can arise – giving up the right to trial, plea bargaining, and appeal waivers are common examples – settled rules provide procedural protections to the defendant and his counsel. *See, e.g.*, Fed. R.

Congress well understood this danger. It protected against it by requiring that litigants be personally informed of their right to the presence of a district judge and by ensuring that, if they exercised this right, they would not be penalized. *See, e.g.*, 28 U.S.C. § 636(c)(2). Since the Court, in *Peretz*, authorized district courts to "experiment" with delegating felony *voir dire* to magistrates, notwithstanding the Court's recognition in *Gomez* that Congress did not specifically contemplate such delegation, it should incorporate the procedural protections that Congress so plainly thought necessary, under Article III and the Due Process Clause, to make an equivalent delegation of misdemeanor or civil trial authority constitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioner's brief, the judgment below should be reversed.[9]

Crim. P. 11(b)(1).

[9] We agree with Petitioner that the court of appeals erred when it reviewed Petitioner's claim for plain error. As Petitioner argues, correctly in our view, a party does not forfeit his entitlement to complain about denial of a constitutional or statutory right where the right is of such a quality that it may only be lost through the defendant's personal, knowing, voluntary waiver. Moreover, as Justice Scalia reasoned in his dissent in *Peretz*, 501 U.S. at 954-55, the "consent" jurisdiction of a magistrate judge under the FMA could never be reviewed,

Respectfully submitted,

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either in a civil or a criminal case, if a party's explicit, contemporaneous objection were required to preserve the claim for appeal.